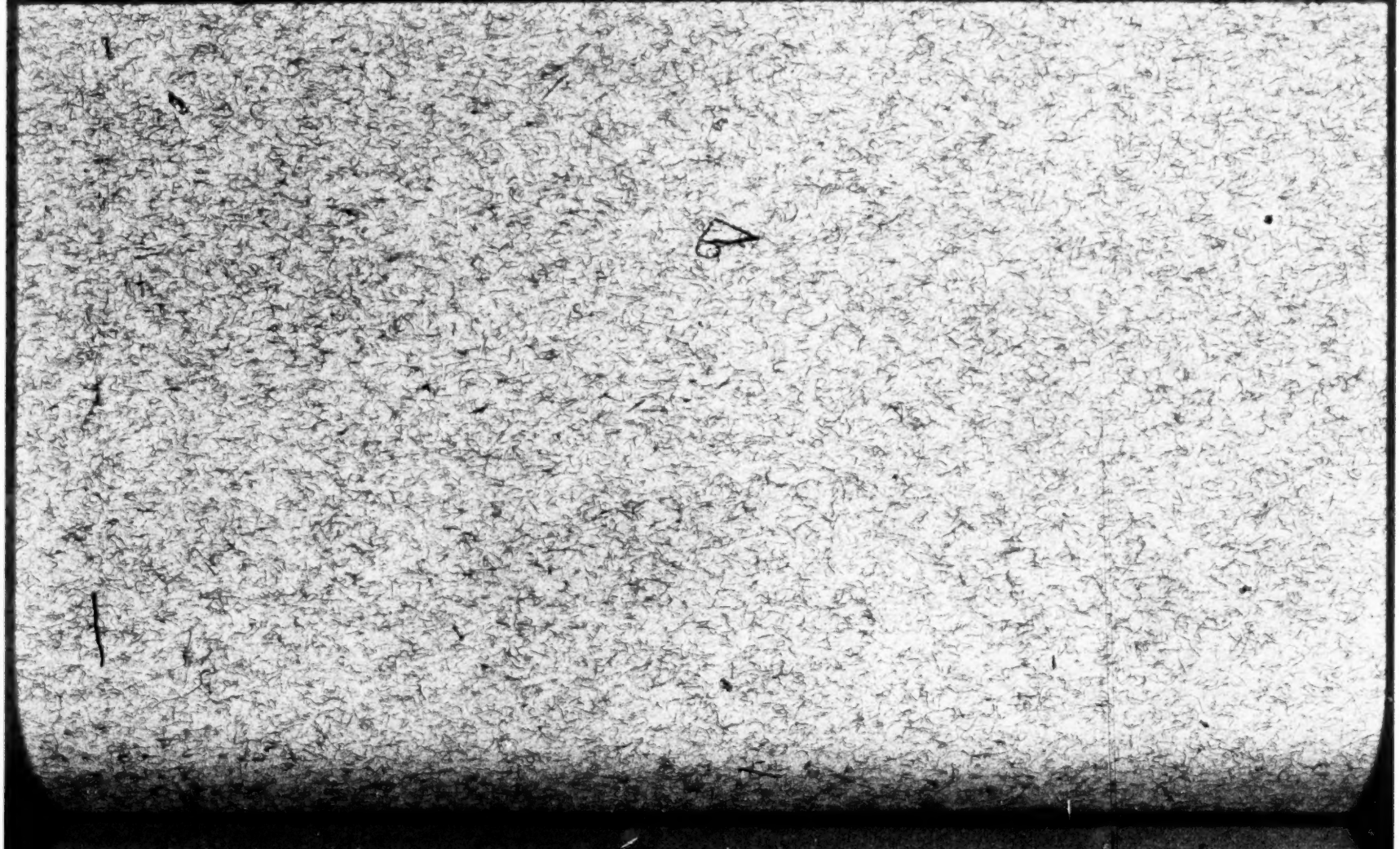

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Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1930

No. 105

TAFT WOOLEN COMPANY, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MAY 7, 1930

CERTIORARI GRANTED JUNE 2, 1930

(35,012)

(35,012)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 881

TAFT WOOLEN COMPANY, PETITIONER,

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THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

	Original	Print
Petition for writ of certiorari	1	1
Record from Court of Claims	1	8
Petition	1	8
General traverse	13	16
Substitution of attorney	13	16
Argument and submission	13	16
Special findings of fact	14	16
Conclusion of law	18	23
Judgment	19	23
Clerk's certificate (omitted in printing)	20	
Order allowing certiorari		25

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 9, 1930

[fol. 1]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 881

TAFT WOOLEN COMPANY, a Body Corporate, Petitioner,

v.

THE UNITED STATES, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Theodore B. Benson, on behalf of Taft Woolen Company a body corporate, prays that a writ of certiorari be issued to review the judgment of the Court of Claims entered in the above entitled cause on March 3, 1930.

Statement

The petitioner, Taft Woolen Company, is a Massachusetts corporation and has its place of business in Caryville, town of Bellingham, Massachusetts. It filed its petition in the Court of Claims on February 21, 1928, and the respondent filed a general traverse.

On June 14, 1919, the petitioner duly filed its return of corporation income and profits taxes for the calendar year 1918 and during the year 1919 paid the tax reported therein in the sum of $429,705.75, and pursuant to an audit of the [fol. 2] return by the Commissioner of Internal Revenue and on July 29, 1921, paid an additional tax in the amount of $3,262.18, making a total of $432,967.93, and being the entire amount of tax imposed under Sections 230 and 301 of the Revenue Act of 1918.

The petitioner on December 8, 1921, duly filed a claim for refund of taxes erroneously assessed and collected, the basis of which claim being an application for assessment under the provisions of Sections 327 and 328 of the Revenue Act of 1918.

On or about October 7, 1922, the Commissioner of Internal Revenue, in consequence of said application and claim,

caused petitioner's tax liability to be recomputed under the relief provisions of said act and found, as a result thereof, that petitioner had been overassessed the sum of $92,443.00. The said overassessment was made the subject of a certificate of overassessment bearing date October 7, 1922, which was forwarded to and received by petitioner, together with a Treasury check in the sum of $92,443.00.

Nearly eighteen months thereafter and on March 25, 1924, the Commissioner notified the petitioner that a re-examination had been made of its application, together with all other evidence in the case, which re-examination disclosed that his prior determination was erroneous and that to correct the excessive overassessment erroneously determined an additional assessment was necessary, which said additional assessment the petitioner was advised would be listed immediately without giving the sixty-day notice provided by the Revenue Act of 1921.

[fol. 3] Prior to April 18, 1924, the petitioner filed a claim in abatement in the amount of $45,398.73 based on the grounds that the matter was res judicata, the collection of the tax was barred by the statute of limitations and that the total tax assessable for said year had already been paid in full.

On November 25, 1924, the Commissioner rejected the claim in abatement and advised the petitioner that the comparatives used in the re-determination "are in the aggregate fairly representative in all the material particulars specified in the Act".

More than five years from the filing of the return and on June 1, 1925, the petitioner paid under protest to the collector the said sum of $45,398.73 and interest demanded thereon in the amount of $1,800.81.

Statutes Involved

The statutes involved are Sections 327 and 328 of the Revenue Act of 1918 (40 Stat. 1057); Section 250(d) of the Revenue Act of 1921 (42 Stat. 227, 265, 266); Sections 607 and 611 of the Revenue Act of 1928 (45 Stat. 791, 874, 875); and Section 3226 of the Revised Statutes, as amended (44 Stat. 116).

Sections 327 and 328 of the Revenue Act of 1918 (40 Stat. 1057) with reference to the computation of the excess profits tax and as applicable here read in part as follows:

"Sec. 327. That in the following cases the tax shall be determined as provided in section 328; * * *

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if [fol. 4] determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. * * *

"Sec. 328. (a) * * * In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactory determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary. * * *"

Section 250(d) of the Revenue Act of 1921 (42 Stat. 277, 265, 266) as applicable here reads in part as follows:

"* * * If upon examination of a return made under * * * the Revenue Act of 1918, or * * * a tax or a deficiency in tax is discovered, the taxpayer shall be notified thereof and given a period of not less than thirty days after such notice is sent by registered mail in which to file an appeal and show cause or reason why the tax or deficiency should not be paid. Opportunity for hearing shall be granted and a final decision thereon shall be made as quickly as practicable. Any tax or deficiency in tax then

determined to be due shall be assessed and paid, * * * within ten days after notice and demand by the collector as hereinafter provided, and in such cases no claim in abatement of the amount so assessed shall be entertained: * * *"

Sections 607 and 611 of the Revenue Act of 1928 (45 Stat. 791, 874, 875) read as follows:

[fol. 5] "Sec. 607. Effect of Expiration of Period of Limitations Against United States

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

"Sec. 611. Collections Stayed by Claim in Abatement

If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

Section 3226 of the Revised Statutes, as amended by the Revenue Act of 1926 and not changed by the Revenue Act of 1928, (44 Stat. 116), reads as follows:

"No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of

Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim [fol. 6] unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

A

Questions Presented

1. Whether the principle of law, that where an administrative officer or head of a department invested by an Act of Congress with exclusive jurisdiction to determine a matter involving purely administrative judgment and discretion has once reached a conclusion which is communicated agreeable to the requirements of the law his decision is final and conclusive and not subject to re-examination by the department, applies to the Commissioner of Internal Revenue?

2. Had the Commissioner of Internal Revenue authority, under Section 250(d) of the Revenue Act of 1921 (42 Stat. 227, 265, 266), to make the re-assessment, as an additional assessment to correct an alleged excessive overassessment where the entire tax imposed by statute had theretofore been assessed and paid in full?

3. Do the provisions of Section 611 of the Revenue Act of 1928 (C. 852, 45 Stat. 791, 876) apply to this case?

4. Had petitioner, on February 21, 1928, under Section 250(d) of the Revenue Act of 1921, acquired a vested right of action, a property right under the Constitution?

[fol. 7] 5. Does Section 611 of the Revenue Act of 1928, enacted May 29, 1928, deprive the Court of Claims of jurisdiction of petitioner's suit and petitioner of its remedy, under Section 3226 of the Revised Statutes, as amended?

B

Reasons for the Allowance of the Writ

1. The holding of the court below that the determination of a profits tax under Sections 327 and 328 of the Revenue Act of 1918 by the Commissioner of Internal Revenue is not final, conflicts with the decision of this Court in the case of Williamsport Wire Rope Co. v. U. S., 277 U. S. 551, 48 S. Ct. 587.

2. The holding of the court below that the Commissioner may review and reverse his previous exercise of discretion in the selection of comparatives for the computation of the tax under Section 328 conflicts with the decisions of this Court in the cases of Ex parte Randolph, 2 Brock (U. S.) 447; U. S. v. Bank of Metropolis, 15 Pet. 245, 40 U. S. 384; West v. Standard Oil Company, 278 U. S. 200, 49 S. Ct. 139 and U. S. v. Arredondo, 6 Pet. 729, 31 U. S. 691, and with the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of Woodworth v. Kales, 26 F. (2d) 178.

3. The holding of the court below that the principle, that an administrative officer's determination is final, does not apply to the Commissioner of Internal Revenue in this case, conflicts with the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of Park Falls Lumber Co. v. Burlingame, 1 F. (2d) 855, certiorari denied 266 U. S. 626, 45 S. Ct. 125.

[fol. 8] 4. The holding of the court below that the Commissioner of Internal Revenue has authority to re-assess as an internal revenue tax a tax previously assessed and collected, conflicts with the decisions of the Circuit Court of Appeals for the Ninth Circuit in the cases of Talcott v. U. S., 23 F. (2d) 897, certiorari denied 277 U. S. 604; and Kelly v. U. S., 30 F. (2d) 193.

5. The holding of the court below that the Commissioner had authority to make the re-assessment and re-collection of an overpayment of a tax legally refunded, amounts to usurpation by the executive department of the functions of the judicial department and the taking of petitioner's property, without due process of law, in violation of Article III, Section I and Amendment V, respectively, of the Constitution.

6. The holding of the court below that the Commissioner may make such re-assessment, in the absence of authority conferred by Congress, conflicts with the decision of this Court in the case of Meriwether v. Garrett, 102 U. S. 501, 26 L. Ed. 197.

7. The foregoing questions are of public importance for the reason that other cases involving the same questions are now pending in the courts and still others are under consideration by the Treasury Department. This is recognized by the Court of Claims in the case of Oak Worsted Mills v. U. S. decided February 19, 1930, 36 F. (2d) 529, in which the court stated that there are other cases on the docket involving the same questions.

[fol. 9] 8. The questions involved in this case with reference to Section 611 of the Revenue Act of 1928 are substantially the same as those involved in the case of Graham and Foster Co-partners etc., petitioners, v. Goodcell, Collector, No. 589, October 1929 Term, in which case this Court granted a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit on March 3, 1930. The decision of the circuit court of appeals is reported in 35 F. (2d) 586.

Wherefore it is respectfully submitted that this petition should be granted.

Taft Woolen Company, by Theodore B. Benson,
Theodore B. Benson, Counsel for Petitioner.

[fol. 1] IN THE COURT OF CLAIMS

No. J-61

TAFT WOOLEN COMPANY, a Body Corporate, Plaintiff,

vs.

THE UNITED STATES, Defendant

I. PETITION—Filed February 21, 1928

To the Honorable Chief Justice and Justices of the Court of Claims:

Your plaintiff, Taft Woolen Company, respectfully represents to this Honorable Court as follows:

1. That plaintiff now is, and at all the times hereinafter mentioned was, a corporation, duly organized and existing under and by virtue of the laws of the State of Massachusetts, having its principal office and place of business in the Village of Caryville, Town of Bellingham, in the County of Norfolk, in said State, and now is, and at all the times hereinafter mentioned was, engaged in the manufacture and sale of woolen goods; and presents this, its petition and claim, in its own right as such corporation and against the United States.

2. That on or about March 14, 1919, as required by the Commissioner of Internal Revenue and on Form 1031-T, [fol. 2] furnished it by said Commissioner for such purpose, plaintiff filed, with the Collector of Internal Revenue at Boston, Massachusetts, its original Income and Profits Tax Return for the calendar year 1918, showing an estimated tax liability of $291,590.59, and at the same time paid to said Collector the sum of $72,897.65.

3. That thereafter and on or about June 14, 1919, plaintiff duly filed with the said Collector its amended and complete return for the year 1918, which said return upon its face showed the amount of tax computed in accordance with the provisions of Section 301 of the said Revenue Act of 1918 to be the sum of $429,616.20 and with said return paid by check to the order of said Collector the sum of $141,910.45 which said sum, together with the sum of $72,897.65

paid by plaintiff upon the filing of its original return on Form 1031-T, constituted fifty per cent of the total tax shown to be due by said return and thereafter, and on or before January 1st, 1919, paid to said Collector the remainder of said tax, to-wit, the sum of $214,808.10.

4. Thereafter, as the result of recommendations made by a Field Agent of the Department of Internal Revenue upon an examination of plaintiff's books of account, an additional assessment in the sum of $3,262.18 was made by the Commissioner against plaintiff for income and profits tax for said year 1918, and thereafter and on or about July 29, 1921, plaintiff paid to the said Collector the sum of $3,262.18, the amount of said additional assessment, making a total of income and profits taxes for the calendar year 1918 paid by [fol. 3] plaintiff to said Collector as aforesaid amounting to $432,878.38.

5. Thereafter and on or about December 8, 1921, plaintiff duly applied to the Commissioner of Internal Revenue for assessment of its profits tax for said year under the provisions of Sections 327 and 328 of said Revenue Act of 1918.

6. Thereafter and upon said application the said Commissioner granted the said application and found and determined and declared of record that the tax if determined without the benefit of said Section 327 would, owing to abnormal conditions affecting the capital and/or income of plaintiff, work upon plaintiff an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of said Section and the tax computed by reference to the representative corporations specified in Section 328 of said Act.

7. Plaintiff's net income for the said year under the provisions of the said Revenue Act of 1918 has been finally determined by the said Commissioner to be $564,049.89, in the correctness of which amount plaintiff acquiesces.

8. On or about October 7, 1922, pursuant to the provisions of Sections 250, 327 and 328 of the said Revenue Act of 1918, the Commissioner examined plaintiff's return for said year and recomputed the amount of tax payable by plaintiff for the said year and determined the amount of profits tax

payable by plaintiff for said year at the sum of $310,485.00, and determined the amount of income tax payable by plain-
[fol. 4] tiff for the said year at the sum of $29,950.38, and determined the total amount of income and profits tax payable by plaintiff for the said year at the sum of $340,435.38.

9. The said amount of profits tax so determined by the Commissioner was computed in accordance with the provisions of Sections 327 and 328 of the Revenue Act of 1918, and was determined by the Commissioner as being the amount bearing the same ratio to plaintiff's net income (in excess of the specific exemption of $3,000.00) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business bore to their average net income (in excess of the specific exemption of $3,000.00) for such year, and was arrived at by the Commissioner by comparing plaintiff only with representative corporations whose invested capital could be satisfactorily determined under Section 326 of said Act, and which were as nearly as may be similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits and excess profits, and all other relevant facts and circumstances.

10. The said determination of the Commissioner was duly communicated to plaintiff by letter or certificate of overassessment of the Commissioner on or about October 7, 1922.

11. In and by said determination of the Commissioner, and the said recomputation of the tax by him, the Commissioner found and determined that the correct amount of
[fol. 5] income and profits tax legally payable by plaintiff for said year was the said sum of $340,435.38, to which sum the Commissioner found that there was to be added interest amounting to the sum of $517.60, and the Commissioner further found and determined that the total tax and interest assessable against plaintiff amounted to $340,952.98. In and by said determination and recomputation, the Commissioner further found that the amount theretofore paid by plaintiff, as aforesaid, amounting to the said sum of $435,395.98, exceeded the said sum of $340,952.98, which

should have been paid, so recomputed, by the sum of $92,-443.00, of all of which the Commissioner in and by said notification of October 7, 1922, notified plaintiff and further notified plaintiff that, pursuant to the said determination and recomputation, plaintiff was entitled to the refund of the said overassessment of $92,443.00.

12. Thereafter and pursuant to the said determination and recomputation and notification, the said sum of $92,-443.00 was duly repaid and refunded to plaintiff by the Commissioner.

13. Long after the said case involving the liability of plaintiff to income and profits taxes for the said year had been closed by the said Commissioner, and the said determination and recomputation made as aforesaid, and the said over-assessment repaid and refunded to plaintiff as aforesaid, and on or about March 25, 1924, the Commissioner undertook and assumed to reopen the said case and to redetermine and recompute the amount of income and profits tax of plaintiff for said period, and assumed and [fol. 6] purported to find and determine that the amount of profits tax payable by plaintiff for said period was the sum of $362,662.65, and the amount of income tax payable by plaintiff for said period was the sum of $23,689.06, and that the total amount of income and profits tax payable by plaintiff for said period was the sum of $386,351.71, which exceeded the sum of $340,952.98, theretofore determined and recomputed by the Commissioner as aforesaid, by the sum of $45,398.73. Thereafter the Commissioner assumed and purported to assess against plaintiff the said alleged deficiency of $45,398.73, assumed and purported to be determined by the Commissioner, to be payable by plaintiff as aforesaid.

14. The Commissioner, having theretofore after due consideration determined and recomputed and assessed the amount of income and profits tax payable by plaintiff for said year, and having allowed and paid to plaintiff the amount of over-assessing resulting from such determination and assessment, and the case having been closed as aforesaid, was without power or jurisdiction to make another and further redetermination, recomputation and

assessment of the same taxes for the said period, and the said assessment of $45,398,73, was without jurisdiction and null and void.

15. In making the said redetermination, recomputation and assessment, the Commissioner erroneously disregarded the determination and assessment of said tax theretofore made by him as aforesaid, and which had become res judicata, and the said redetermination, recomputatin and assessment of $45,398.73 was erroneous and illegal for that [fol. 7] reason, even assuming that the Commissioner had any jurisdiction whatever to make a further determination or computation of taxes for said year.

16. The Commissioner, in assuming to reopen the case and to make a new and further redetermination, recomputation and assessment of an alleged deficiency as aforesaid has not disclosed to plaintiff the facts, evidence or basis upon which the Commissioner acted in assuming to make the same, nor given plaintiff an opportunity of being heard thereon, and has not disclosed to plaintiff any new facts or additional evidence as a basis of or ground for such reopening or new redetermination, and plaintiff avers that there are no new facts and no additional evidence which might have constituted any basis of or ground for any such reopening or redetermination or assessment.

17. The failure and refusal of the Commissioner to disclose the said facts and information to plaintiff, and to give plaintiff an opportunity of being heard thereon, operated to deprive plaintiff of its legal rights under the law and the regulations, and constitutes a deprivation of plaintiff's property without due process of law in violation of the provisions of the Fifth Amendment to the Constitution of the United States.

18. At the time of the making of the said redetermination and recomputation, and at the time of making of the said assessment, and at the time of the enactment of the Revenue Act of 1924, more than five (5) years after the said return filed as aforesaid on or about March 14, 1919, was made [fol. 8] had expired. At the time of the collection and payment of the said assessment under protest as hereinafter set forth, more than five years after the said returns

and each of them were made had expired. The Commissioner and the taxpayer, the plaintiff herein, have not consented in writing to the determination or assessment or collection of said tax for said year of 1918, after the time prescribed by law for the assessment thereof, and the return was not false or fraudulent with intent to evade the tax. By virtue of the provisions of Section 250 (d) of the Revenue Act of 1918, and of Section 250 (d) of the Revenue Act of 1921 (42 Stat. 227), the Commissioner was, by reason of said lapse of time, without power to make said determination of said assessment, or to enforce collection thereof.

19. The said redetermination and recomputation of the amount of said taxes by the Commissioner purported to be, but was not in fact based upon the tax paid for the said period by representative corporations engaged in a like or similar trade or business, which were as nearly as might be similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits and excess profits tax and all other relevant facts and circumstances.

20. The amount of profits tax bearing the same ratio to plaintiff's net income (in excess of the specified exemption of $3,000) for the said taxable year, as the average tax of representative corporations engaged in a like or similar trade or business whose invested capital could be satis- [fol. 9] factorily determined under section 326 of said act, and which were as nearly as may be similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits and excess profits, and all other relevant facts and circumstances, bore to their average net income (in excess of the specified exemption of $3,000) for such year, was not greater than the sum of $310,485.00 as first determined by Commissioner as aforssaid, in accordance with the provisions of said sections 327 and 328 of said Revenue Act of 1918, and the total income and profits tax lawfully and properly payable by said plaintiff for said year was not in excess of the said amount of $340,952.98 determined by the Commissioner as aforesaid, and that the

said first determination of the Commissioner was correct and lawful.

21. After the making of the said redetermination and recomputation and of the said assessment of $45,398.73, plaintiff duly protested to the Commissioner against the same and on or about April 11, 1924, filed with the said Collector, in accordance with the law and the regulations established by the Secretary of the Treasury in that behalf, a claim for the abatement of said assessment of $45,398.73, in and by which said claim for abatement plaintiff protested that said redetermination and assessment were without jurisdiction or power, and were null and void, illegal, erroneous, and excessive upon all the grounds herein set forth. That thereafter and on or about November 25, 1924, the Commissioner rejected the said claim for abate- [fol. 10] ment and notified plaintiff that plaintiff would be required to make payment of the amount of said assessment to the said Collector upon receipt of notice and demand from him.

22. Thereafter and on or about May 20, 1925, the said Collector served upon plaintiff a notice and demand for the payment of the said sum of $45,398.73, the amount of said assessment, together with interest, amounting in all to the sum of $47,199.54, and then and there notified plaintiff that in the event of plaintiff's failure to make payment thereof within ten days after the date of said notice, plaintiff would be liable to additional penalties and penal interest. Thereafter and on or about May 30, 1925, under duress of the said assessment and of the said demand, and to avoid threatened penalties and the accumulation of excessive interest charges, and the threatened seizure of plaintiff's property under warrant of distraint, plaintiff paid to said Collector, under protest, the said sum of $47,199.54, the amount of said assessment and interest demanded as aforesaid.

23. Thereafter and on or about April 7, 1926, plaintiff duly filed with the said Collector, in the form and manner required by law and the regulations of the Secretary of the Treasury of the United States established in pursuance thereof, a claim for refund of the said assessment and in-

terest of $47,199.54, illegally collected as aforesaid, which claim for refund was thereafter and on or about May 12, 1926, rejected and disallowed by said Commissioner, and the said application for refund denied, and no part of said [fol. 11] sum of $47,199.54 has been repaid to plaintiff but the whole of said sum of $47,199.54, tax paid by plaintiff as aforesaid, is now wrongfully and unlawfully retained and held by the United States.

24. Thereafter and on or about May 26, 1927, plaintiff duly filed with the said Collector, in the form and manner required by law and the regulations of the Secretary of the Treasury of the United States established in pursuance thereof, another claim for refund of the said assessment and interest of $47,199.54 illegally collected as aforesaid; that more than six months have expired since the filing of said claim for refund, but that the Commissioner of Internal Revenue has rendered no decision thereon.

25. Plaintiff avers that by reason of the premises plaintiff is entitled to refund of the said sum of $47,199.54 together with interest thereon from May 31, 1925.

26. No other action than as aforesaid has been had on this claim in Congress or by any of the Departments. The plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government. It is and always has been the sole and absolute owner of the claim here presented and has made no transfer or assignment of said claim or of any part thereof or of any interest therein. It believes the facts as stated herein to be true, and that it is justly entitled to the amount claimed from the United States of America, after allowing all just credits and set offs.

[fol. 12] Plaintiff therefore prays judgment in its favor against the United States of America for the said sum of $47,199.54, with interest thereon from May 31, 1925.

Taft Woolen Company, Plaintiff, by Frederick G. Fischer, Attorney for Plaintiff.

Address of plaintiff's attorney: Frederick G. Fischer, 111Broadway, Borough of Manhattan, City of New York, New York.

Duly sworn to by Harold M. Bullard. Jurat omitted in printing.

[fol. 13] II. General Traverse—Filed March 31, 1928

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

G. H. F.

III. Substitution of Attorney

The original petition in this case was filed by Frederick G. Fischer, Esq.

On May 24, 1929, on motion made therefor, Chester F. Williams, Esq., was substituted as attorney of record.

IV. Argument and Submission

On January 14 and 15, 1930, this case was argued and submitted on merits by Mr. Guil Barber, for the plaintiff, and by Mr. George H. Foster, for the defendant.

[fol. 14] V. **Special Findings of Fact and Conclusion of Law**—Filed March 3, 1930

This case having been heard by the Court of Claims, the court, upon the report of a commissioner, makes the following

Special Findings of Fact

I

The plaintiff, Taft Woolen Company, is a corporation duly organized and existing under the laws of the State

of Massachusetts, having its principal office and place of business in the village of Caryville, town of Bellingham, in said State, and during the calendar year ended December 31, 1918, was, and now is, engaged in the manufacture and sale of low-grade woolens.

II

On or about March 14, 1919, the plaintiff filed with the collector of internal revenue at Boston, Massachusetts, for the calendar year 1918, its Tentative Return and Estimate of Corporation Income and Profits Taxes and Request for Extension of Time for Filing Return, on Form 1031-T, furnished to plaintiff by the Commissioner of Internal Revenue, and on said date paid to the said collector the sum of $72,-897.65 as one-fourth of the estimated tax of $291,590.59 as shown on said tentative return. The following rider was attached to the said return:

"The company claims the benefit of sections 327 and 328 of the excess and war profits law, and article 901 of the Regulations. The tax as figured without the benefit of these sections is in excess of 50% of its net income, and for that reason the tax is estimated at 50% of such income, and the income tax has been computed upon the basis of a deduction of such tax. The company reserves all rights of protest against the application of regulations and Treasury decisions affecting the computation of its tax."

[fol. 15] III

On or about June 14, 1919, the plaintiff completed said return as filed on or about March 14, 1919, as aforesaid, by filing its corporation income and profits tax return for the calendar year 1918 on Form 1120 for said calendar year with the collector of internal revenue, which return showed a total tax liability computed under the provisions of sections 201 and 301 of the revenue act of 1918 of $429,616.20. At the time of filing Form 1120 as aforesaid the plaintiff paid to the said collector the sum of $142,000, being one-quarter of the total tax so found to be due, to wit, $107,-404.05, plus a deficiency in the March 14, 1919, payment of $34,506.40, and on account of interest on said deficiency, $89.55. Subsequently, as required by law, the plaintiff paid

to the said collector on September 13, 1919, the sum of $107,404.05, and on December 13, 1919, the sum of $107,404.05, making in all the total sum of $429,705.75 so paid.

IV

On or about February 14, 1921, the Commissioner of Internal Revenue informed the plaintiff that an audit of its return for the year ended December 31, 1918, indicated that it was subject to an additional tax in the amount of $3,262.18 for the year. On July 29, 1921, the plaintiff paid said sum to the said collector, thus making a total of income and profits taxes for the calendar year 1918 paid by the plaintiff to the said collector as aforesaid amounting to $432,967.93.

V

The said commissioner having failed to act on plaintiff's claim and application for the benefit of sections 327 and 328 of the revenue act of 1918, plaintiff, on or about December 8, 1921, duly filed with the collector of internal revenue aforesaid a further application for assessment of its profits tax under the provisions of said sections, which said application was attached to a claim for a refund of taxes erroneously or illegally assessed and collected in the sum of $152,008.52.

VI

On or about October 7, 1922, the Commissioner of Internal Revenue, in consequence of said application and claim, caused plaintiff's tax liability to be recomputed under the relief provisions of said act and found, as a result thereof, that plaintiff had been overassessed the sum of $92,443.00. The said overassessment was made the subject of a certificate of overassessment bearing date October 7, 1922, which was forwarded to and received by plaintiff, together with a Treasury check in the sum of $92,443.00, and in due course plaintiff received the proceeds thereof.

VII

On or about March 25, 1924, the Commissioner of Internal Revenue informed the plaintiff that a reexamination had

been made of its application for assessment of its profits tax under the relief provisions of the revenue act of 1918, together with all other evidence in the case, which reexami- [fol. 16] nation had disclosed the fact that the computation previously made which had resulted in the issuance of a certificate of overassessment in the amount of $92,443.00 was an erroneous one, and that a correct computation of the plaintiff's tax liability under sections 327 and 328 of the revenue act of 1918 indicated an additional tax due of $45,-398.73. The plaintiff was further informed that the additional assessment necessary to correct the excessive overassessment erroneously determined would be listed immediately without the usual thirty-day notice as provided in section 250 (d) of the revenue act of 1921. The said amount of $45,398.73 was reassessed by the said commissioner shortly thereafter.

VIII

On April 18, 1924, the collector of internal revenue at Boston, Massachusetts, transmitted to the plaintiff a demand for tax, notifying the plaintiff that there had been assessed against it the sum of $45,398.73, and that if payment was not made within ten days from the date of the notice, a penalty of 5% of the amount of tax would be added plus interest at the rate of 1% per month until paid.

Prior to April 18, 1924, the plaintiff filed in the office of the Commissioner of Internal Revenue at Washington a claim for abatement of the additional tax of $45,398.73 assessed, on the grounds that the matter had become res adudicata and was also barred by the statute of limitations; that the total tax assessable for said year had already been paid in full; that the said claim for refund had been duly allowed only after careful consideration of all the facts and that check in payment thereof had been accepted in full settlement; that the said commissioner was without legal authority to make the re-examination and assessment.

On or about November 25, 1924, the Commissioner of Internal Revenue rejected the plaintiff's claim for abatement stating that—

"* * * the bureau holds that the Commissioner of Internal Revenue may assess any tax found to be due even

though such tax may have previously been erroneously abated or refunded, provided that such assessment is made within the time prescribed by statute and that the comparatives used in the final determination are in the aggregate fairly representative in all the material particulars specified in the act."

IX

On or about December 20, 1924, the plaintiff filed an appeal from the said additional tax of $45,398.73 with the United States Board of Tax Appeals, which said appeal was dismissed by said board April 11, 1925, on the ground it was without jurisdiction.

X

On or about May 20, 1925, the said collector demanded payment in writing of the said sum of $45,398.73, together with interest in the total sum of $47,199.54, and notified plaintiff that if said sum was not paid within ten days after date of said notice plaintiff would be liable for additional penalties and penal interest.

[fol. 17] Thereafter on or about June 1, 1925, the plaintiff paid to the collector of internal revenue at Boston the sum of $47,199.54, which payment included both the special assessment of $45,398.73 and interest in the amount of $1,800.81. In its letter of May 30, 1925, transmitting to the collector of internal revenue the check for $47,199.54, hereinbefore referred to, plaintiff stated that the payment was made under protest. It asserted that the alleged assessment was made illegally, erroneously, and wrongfully; that the payment was made under protest because demanded and to avoid threatened penalties and the accumulation of excessive interest charges and the seizing of the taxpayer's property under warrant of distraint. Plaintiff reserved the right to recover all or any portion of the payment by any lawful process.

XI

On or about April 7, 1926, plaintiff filed with the collector of internal revenue its claim for refund of taxes ille-

gally collected in the sum of $47,199.54. Plaintiff alleged that its application should be allowed for the following reasons:

"The additional assessment was beyond the power of the commissioner to make, the amount of income and profits taxes payable by claimant for said period having been theretofore determined and assessed by the commissioner, and the case having been closed; the commissioner made the said additional assessment in disregard of the determination and assessment theretofore made by him, and reopened the case without additional evidence or sufficient ground; the amount of tax assessed was erroneously computed and excessive, and was determined without regarding claimant's right to a disclosure of the facts and evidence upon which same was based, and in violation of the fifth amendment to the Constitution of the United States; the assessment and collection of the said taxes were barred by limitation; and the additional assessment was illegal, excessive, and erroneous on other grounds, which claimant reserves the right to present in detail hereafter."

On or about May 18, 1926, the plaintiff's claim for refund was rejected by the Commissioner of Internal Revenue, the commissioner stating in his letter of rejection that the evidence in hand did not warrant any change in the computation of the tax liability disclosed by the commissioner's letter of March 25, 1924, hereinbefore referred to in Finding VIII hereof.

XII

On or about May 9, 1927, the plaintiff filed another claim for refund of said sum of $47,199.54, on the following grounds:

"1. That the alleged tax is erroneous, excessive, and illegal.

"2. That the collection of said alleged tax was barred, at time of payment, by the tolling of the statute of limitations, for the following reasons, to wit:

"a. That payment was exacted more than five years after the return was filed;

"b. That no suit or proceeding was instituted within the five-year period;

[fol. 18] "c. That the return was not false or fraudulent, neither had 'both the commissioner and the taxpayer consented in writing to a later determination, assessment, and collection of the tax.' (See sec. 250 (d), rev. act 1921.)

"3. That, by reason of the expiration of the statute of limitations applicable, not only was the procedure for its collection barred, but the right, if any, of the Government to the alleged tax itself is extinguished.

* * * * * * *

"Reference is here made to a claim in abatement, also a claim for refund, together with supporting evidence and brief, heretofore filed with the Commissioner of Internal Revenue in reference to the said alleged tax, all of which is hereby reaffirmed and made a part hereof with the same force and effect as if hereto attached."

XIII

The defendant, the United States, still has and retains the sum of $47,199.54, herein sought to be recovered.

XIV

Plaintiff's return was neither false nor fraudulent, with intent to evade the tax, nor had plaintiff signed any waiver in connection with said calendar year nor any consent in writing with the commissioner for a later determination, assessment, and collection of the tax.

XV

More than six months had expired since the filing of said claim for refund of May 9, 1927, and the Commissioner of Internal Revenue had rendered no decision thereon at the time of the filing of plaintiff's petition herein—on, to wit, February 21, 1928.

XVI

No other action has been taken, or had, either in Congress or by any of the departments of the Federal Gov-

ernment. The plaintiff is now and has always been the sole owner of the claim or claims herein referred to and has not assigned or transferred the same, or any part thereof, or interest therein, and has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided or abetted or given encouragement to rebellion against the Government.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is not entitled to recover and the petition is therefore dismissed. Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record herein, the amount thereof to be ascertained by the clerk and collected by him according to law.

See Oak Worsted Mills, No. J.-180, decided February 17, 1930.

[fol. 19] VI. Judgment

At a Court of Claims held in the City of Washington on the 3rd day of March, A. D., 1930, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and the petition is therefore dismissed.

[fol. 20] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 35,012. Court of Claims. Term No. 881. Taft Woolen Company, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed May 7, 1930. File No. 35,012.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 2, 1930

The petition herein for a writ of certiorari to the Court of Claims is granted, the briefs and argument to be limited to the question of the validity and effect of Sec. 611, Revenue Act of 1928, and the case is advanced to be heard immediately following No. 880, Oak Worsted Mills vs. The United States.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

INDEX.

	Page.
I. Opinion of the court below	1
II. Jurisdiction	1
III. The facts	2
IV. Statutes involved	2
V. Specification of errors to be urged	2
VI. Argument	4
Summary of argument	4
A. The determination of the profits tax by the Commissioner of Internal Revenue under the provisions of Sections 327 and 328 of the Revenue Act of 1918 is final and conclusive and can not be redetermined	4
B. The Commissioner of Internal Revenue was without statutory authority to make the reassessment to correct an alleged erroneous overassessment previously determined	4
C. The provisions of Section 611 of the Revenue Act of 1928 do not apply	4
D. Section 611 if construed to apply would be unconstitutional	5
Argument	5
Conclusion	11

CASES CITED.

Austin Co. *v.* Commissioner, 35 F. (2d) 910, certiorari denied March 17, 1930	9
Ex parte Randolph, 2 Brock (U. S.) 447	5
Graham & Foster, Co-partners, etc. *v.* Goodcell, Collector, S. Ct. No. 589, October Term, 1929	11
Kelley *v.* United States, 30 F. (2d) 193	8, 10
Oak Worsted Mills *v.* United States, 38 F. (2d) 699	9
Russell *v.* United States, 278 U. S. 181, 49 S. Ct. 121	7, 8, 9

Talcott *v.* United States, 23 F. (2d) 897, certiorari denied, 48 S. Ct. 601 10
United States *v.* Arredondo, 6 Pet. 691, 729, 730 5
United States *v.* Bank of Metropolis, 15 Pet. 377, 40 U. S. 240 . . . . . 5, 10
United States *v.* Burden, Smith & Co., 33 F. (2d) 229 . . 11
United States *v.* Robbins, 269 U. S. 315, 46 S. Ct. 148 . . 10
West *v.* Standard Oil Company, 278 U. S. 200, 49 S. Ct. 138 5
Williamsport Wire Rope Co. *v.* United States, 277 U. S. 551, 48 S. Ct. 587 . . . . . 6, 7

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1929

No. 881.

TAFT WOOLEN COMPANY, PETITIONER,

v.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

I.

Opinion of the Court Below.

The special findings of fact and conclusion of law are officially reported in 38 F. (2d) 704, and will be found printed at R.16–23.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 3 (a) of the Act of February 13, 1925 (43 Stat. 936).

The judgment of the Court of Claims was entered on March 3, 1930 (R. 23). Application for writ was presented May 7, 1930.

The suit brought in the Court of Claims is for the recovery of corporation income and profits taxes erroneously and illegally assessed and collected, jurisdiction of which is conferred upon the Court of Claims by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes.

III.

The Facts.

The facts of the case are printed in the petition (R. 1–2) and to avoid repetition counsel begs leave to refer to those pages which contain the shortest and plainest statement that he has been able to make.

IV.

The Statutes Involved.

The statutes involved in this case are printed in the petition (R. 2–5) and to avoid repetition counsel begs leave to refer thereto.

V.

Specification of Errors to be Urged.

The errors which the petitioner urges as grounds for the granting of the writ of certiorari and for the review and reversal of the decision of the Court of Claims are:

1. The court below erred in holding that the Commissioner of Internal Revenue once having exercised a discretion and judgment invested exclusively in him by an Act of Congress and having determined and refunded an overassessment of tax, had authority to thereafter review the same facts and reach a different conclusion.

2. The court below erred in holding that the determination of the tax by the Commissioner of Internal Revenue under the provisions of Sections 327 and 328 of the Revenue Act of 1918 was merely prima facie and not conclusive.

3. The court below erred in failing to hold that once having computed the profits tax on the basis of comparatives selected in the exercise of the discretion conferred on him by the provisions of Section 328 of the Revenue Act of 1918 and having issued a certificate of overassessment and made the refund of the overpayment, the judgment of the Commissioner of

Internal Revenue was final and conclusive and was thereafter not subject to review.

4. The court below erred in failing to hold that under the provisions of the Revenue Act of 1921 the Commissioner of Internal Revenue was precluded from making the reassessment, as an additional assessment to correct an alleged excessive overassessment previously determined, where the entire amount of the tax imposed by statute had once been assessed and paid.

5. The court below erred in failing to hold that the Commissioner of Internal Revenue in assuming to decide that his previous determination of the profits tax under Section 328 was erroneous and in recollecting an amount theretofore paid usurped the functions of the judiciary in violation of Article III, Section I, of the Constitution and took the petitioner's property without just compensation in violation of the Fifth Amendment.

6. The court below erred in holding that Section 611 of the Revenue Act of 1928 is applicable to this case.

7. The court below erred in holding that Section 611 deprived the Court of Claims of jurisdiction in this case.

8. The court below erred in failing to hold that the petitioner's remedy under Section 3226 of the Revised Statutes was not affected by Section 611 of the Revenue Act of 1928.

9. The court below erred in failing to hold that the application of Section 611 to this case would render that section unconstitutional.

10. The court below erred in failing to hold that on the expiration of the five-year period of limitation in Section 250 (d) of the Revenue Act of 1921 the petitioner's liability for taxes, if any, expired.

VI.

The Argument.

Summary of Argument.

A. The determination by the Commissioner of Internal Revenue of the profits tax under Sections 327 and 328 of the Revenue Act of 1918 is final and conclusive and can not be redetermined.

B. The Commissioner of Internal Revenue was without statutory authority to make the reassessment to correct an alleged erroneous overassessment previously determined.

C. The provisions of Section 611 of the Revenue Act of 1928 do not apply to this case for the following reasons:

1. The jurisdiction of the court below is conferred by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes and not by Section 607 of the Revenue Act of 1928 and the case does not come within the provisions of Section 607 nor within the exceptions thereto in Section 611 of the same Act.

2. The provisions of Section 611 are not to be construed to be retroactive to apply to this case.

3. In this case no internal revenue tax was legally assessed within the meaning of the provisions of Section 611.

4. The amount in controversy is not an internal revenue tax within the meaning of Section 611, because the entire tax imposed by statute had already been assessed and paid.

5. In this case no claim in abatement within the meaning of Section 611 was filed. The claim was not in abatement but in bar of the right of the Commissioner to make the re-collection.

6. The collection of no part of a tax was ever stayed by a claim in abatement or otherwise.

7. The amount in controversy was paid under protest.

8. The petitioner and the Commissioner did not enter into a statutory consent in writing for a later determination, assessment or collection of any tax beyond the statutory period as provided in Section 250 (d) of the Revenue Act of 1921.

D. The application of Section 611 of the Revenue Act of 1928 to this case would render it unconstitutional for the following reasons:

1. The power conferred on Congress by the Sixteenth amendment is limited to the laying and collecting of taxes on incomes.

2. The petitioner would be deprived of its property without due process of law and without just compensation in violation of the Fifth Amendment.

The Argument.

A. *The determination of the profits tax by the Commissioner of Internal Revenue under the provisions of sections 327 and 328 of the Revenue Act of 1918 is final and conclusive and can not be redetermined.*

A principle of law that this Court has uniformly upheld is that, where an administrative officer vested by an Act of Congress with exclusive jurisdiction of a matter involving administrative discretion and judgment has once reached a conclusion which has been communicated agreeable to the requirements of law, his decision is final and is not subject to reexamination.

This principle has been recognized in the following cases: *Ex parte Randolph*, 2 Brock (U. S.) 447; *United States* v. *Bank of Metropolis*, 15 Pet. 377, 40 U. S. 240; *West* v. *Standard Oil Company*, 278 U. S. 200, 49 S. Ct. 138. This principle was stated by Mr. Justice Baldwin in *United States* v. *Arredondo*, 6 Pet. 691, 729–730, as follows:

"* * * It is a universal principle, that, where power or jurisdiction is delegated to any public officer or

> tribunal over a subject matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject matter; and individual rights will not be disturbed collaterally, for anything done in the exercise of that discretion, within the authority and power conferred. The only questions which can arise * * * are, power in the officer, and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer; whether executive * * * legislative * * * judicial * * * or special * * * unless an appeal is provided for, or other revision by some appellate or supervisory tribunal is prescribed by law. * * *"

The question here involved is whether this principle applies to the Commissioner of Internal Revenue in the exercise of that discretion, which this Court in *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551, 48 S. Ct. 587, held was conferred upon him exclusively by Sections 327 and 328 of the Revenue Act of 1918 to select comparatives for the computation of the profits tax and from the exercise of which discretion it was held no appeal was provided.

In this case the Commissioner determined that the petitioner came within the provisions of Section 327 and that it was entitled to have the profits tax computed under the provisions of Section 328.

After having determined that the petitioner was so entitled, the Commissioner in October, 1922, computed the profits tax on the basis of certain comparatives selected by him and actually made a refund on the basis of such comparatives. Subsequently and during March, 1924, and without reversing his previous position as to the fact that petitioner's case fell within the scope of Section 327 of the Revenue Act of 1918 and that the tax should be computed under the provisions of Section 328 of the said Act, the Commissioner undertook to reinvoke the discretion which he had already exercised and proceeded to recompute the profits tax by choosing from his files and substituting different comparatives showing a greater average rate of excess profits tax to net income which resulted in the increase of petitioner's taxes. In explanation of this

the Commissioner stated "that the comparatives used in the final determination are in the aggregate fairly representative." In this case there is no fact controversy.

The question that the petitioner seeks to have this Court pass on is the right of the Commissioner of Internal Revenue to reexercise the discretion vested exclusively in him to select comparatives for the computation of the profits tax. Under the decision in the *Williamsport Wire Rope Co., supra,* this discretion is held to be vested solely in the Commissioner and his determination thereunder is not subject to question in a case like this where no appeal can be taken to the Board of Tax Appeals.

The petitioner submits that the decision of the court below, that the exercise of discretion by the Commissioner is not final, is erroneous and should be reversed. The question involved is of public importance for the reason that there are a number of other cases pending which involve the same question and for the further reason that if the decision of the court below is not reversed it will mean the Commissioner can reopen any case in which the statute of limitations has not run. The question here involved is one of importance and calling for the exercise of this Court of its supervisory powers over the Court of Claims.

B. *The Commissioner of Internal Revenue was without statutory authority to make the reassessment to correct an alleged erroneous overassessment previously determined.*

The powers possessed by the Commissioner of Internal Revenue are such only as are conferred on him by Congress. At the time he assumed to make the reassessment here in question the Revenue Act of 1921 was in force and is controlling, *Russell* v. *United States,* 278 U. S. 181, 49 S. Ct. 121. The authority of the Commissioner to assess and collect taxes under such Act is that conferred by Section 250, subparagraph (b) of which defines a deficiency and authorizes the Commissioner to assess a deficiency or to refund an overpayment and subparagraph (d) provides the manner in which the Commissioner may make the assessment of a tax or a deficiency and provides

for its collection. Subparagraph (b) defines a deficiency as the excess of the amount "which should have been paid" over "the amount already paid." Subparagraph (d) authorizes the Commissioner to make an assessment where "a tax or a deficiency in tax is discovered." Under the statute the authority of the Commissioner to make an assessment is limited to the discovery of a tax or a deficiency. In the present case the full amount of the greatest possible tax was assessed at the time of the filing of the return and was paid during the year 1919. There was, therefore, no tax or deficiency in tax which had not already been discovered, assessed and paid. There was no tax or deficiency "which should have been paid." In a similar case, *Kelley* v. *United States*, 30 F. (2d) 193, the Circuit Court of Appeals for the Ninth Circuit stated:

> "There was some discussion on the argument as to the meaning of a deficiency as defined in the revenue laws, but the entire tax imposed by the government was paid, and, if there was no tax, there could in the nature of things be no deficiency."

The petitioner concedes that the Commissioner has authority to make an assessment of an additional tax, for such constitutes a deficiency within the meaning of Section 250 (b). In this case, however, there was no additional tax or deficiency in tax, but the Commissioner attempted to make an additional assessment to correct an alleged erroneous overassessment previously determined. The law provides for the assessment of an additional tax not previously assessed, but not for the additional assessment of a tax previously assessed and paid. Therefore, the petitioner submits that the Commissioner exceeded the authority conferred on him by statute.

This Court in the *Russell* case, supra, held that an assessment made prior to June 2, 1924, was controlled by the provisions of the Revenue Act of 1921 and not by the provisions of the Revenue Act of 1924. The court below failed to follow the decision in that case and took the position that the definition of a deficiency to be applied is that found in Section 273 of the Revenue Acts of 1924 and 1926. In the course of its

supplemental opinion in the *Oak Worsted Mills*, 38 F. (2d) 699, and followed in this case, the court below stated:

> "It should also be noted that in section 273 of the revenue acts of 1924 and 1926 Congress provided that the commissioner might reverse his action in the case of an abatement, refund, or credit and reassess and collect the amount. It expressly recognizes that in arriving at the correct tax to be collected there may have been additional assessments or collections, abatements, refunds, and credits and clearly indicates that a refund, erroneous or otherwise, does not bar action by the commissioner within the statutory period provided by law. An amount erroneously refunded becomes none the less a tax because of that fact."

The holding of the court below that the definition of a deficiency to be applied to this case is that found in Section 273 of the Revenue Acts of 1924 and 1926 is clearly contrary to the decision of this Court in the *Russell* case, *supra*, and to the clearly expressed provisions of Section 280 of the Revenue Act of 1924 and Section 283 of the Revenue Act of 1926.

In addition to holding that the provisions of Section 273 of the Revenue Acts of 1924 and 1926 applied to this case the court relied on the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of *Austin Co.* v. *Commissioner*, 35 F. (2d) 910, certiorari denied March 17, 1930, in which case there was a deficiency in tax, as defined by the Revenue Act of 1924 and the case came within the jurisdiction of the Board of Tax Appeals under the provisions of the Revenue Act of 1926. In the present case there was no deficiency. The provisions of the Revenue Acts of 1924 and 1926 do not apply. The Board of Tax Appeals dismissed the petitioner's appeal for lack of jurisdiction.

The Act of 1921, which is applicable to this case, provides for the assessment and collection of a tax and for the refund of an overpayment, but petitioner submits that when a tax has once been paid there can be no further liability for taxes and a refund does not restore the tax and that a refund is not subject to recall as a tax. If recoverable at all it is recoverable as a sum illegally paid out of the Treasury and by resorting

to the courts. In *United States* v. *Bank of Metropolis*, 15 Pet. 377, *supra*, the Court at page 401 stated:

> "But if a credit has been given, or an allowance made, as these were, by the head of a department, and it is alleged to be an illegal allowance, the judicial tribunals of the country must be resorted to, to construe the law under which the allowance was made, and to settle the rights between the United States and the party to whom the credit was given, * * *"

The Circuit Court of Appeals for the Ninth Circuit in *Kelley* v. *United States*, *supra*, stated:

> "* * * When once paid, a tax is gone, and a refund of the money does not restore it. 'If the owner or any other person entitled to make payment of the tax shall do so, the lien will not only be discharged absolutely, but all authority to proceed further against the property will be at an end.' Cooley on Taxation, 3rd Ed., p. 810. From this view, we know of no dissent."

In *Talcott* v. *United States*, 23 F. (2d) 897, certiorari denied 277 U. S. 604, 48 S. Ct. 601, the Circuit Court of Appeals for the Ninth Circuit held that an amount refunded could be recovered not as a tax but as a sum erroneously paid out of the Treasury and in passing on the counter-claim filed in the case the court stated: "the counter-claim is not a proceeding for the collection of taxes. It is a demand for the repayment to the government of moneys which had been illegally and by mistake paid by an officer of the United States."

If the principle applied in the *Kelley* and *Talcott* cases, that a tax once refunded is not recoverable as a tax but by suit by United States, is correct, then the court below erred in this case. The United States prevailed in the *Talcott* case and succeeded in recovering, after the statute of limitations for assessment and collection had expired, an estate tax erroneously refunded under the decision of this Court in *United States* v. *Robbins*, 269 U. S. 315, 46 S. Ct. 148.

There is a direct conflict between the decision in this case and the decisions in the *Kelley* and *Talcott* cases and the writ should be granted for that reason.

Congress has considered the right of the United States to recover a tax erroneously refunded and in Section 610 (b) of the Revenue Act of 1928 provided that an internal revenue tax "which has been erroneously refunded * * * may be recovered by suit brought in the name of the United States." The petitioner submits that Section 610 (b) is to be construed to be retroactive to apply to this case and that the remedy therein provided by Congress is exclusive. The decision of the court below is, therefore, contrary to the clearly expressed intent of Congress that recovery of an erroneous refund may be made only by suit in the name of the United States.

C. *The Provisions of Section 611 of the Revenue Act of 1928 do Not Apply*

AND

D. *Section 611 if Construed to Apply Would be Unconstitutional.*

The decision of the court below with reference to the provisions of Section 611 of the Revenue Act of 1928 conflicts directly with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *United States* v. *Burden, Smith & Co.*, 33 F. (2d) 229.

This Court on March 3, 1930, granted a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit on the petition of *Graham & Foster, Co-partners, etc.* v. *Goodcell, Collector*, No. 589, October, 1929, Term, to review the decision of that court with reference to the application and constitutionality of Section 611 of the Revenue Act of 1928. The application and constitutionality of Section 611 are also presented in the petition in this case and counsel submits that the same reasons exist for the allowance of the writ as were presented to the court in the petition of Graham & Foster, Co-partners, etc. The application for the writ in the *Graham & Foster* case was not opposed by the Attorney General.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for and demanding the exercise by this Court of its supervisory powers in order that there may be a final determi-

nation of the authority of the Commissioner of Internal Revenue, after he has once fully exercised the discretion invested exclusively in him to compute the profits tax under Sections 327 and 328 of the Revenue Act of 1918, to thereafter review his previous computation and reach a different conclusion; that there may be a final determination of the authority of the Commissioner of Internal Revenue under the Revenue Act of 1921 after a tax has been assessed, paid and refunded to reassess and collect the amount thereof from the taxpayer as a tax; and that there may be a final determination of the construction and constitutionality of the provisions of Sections 607 and 611 of the Revenue Act of 1928 and that to such ends the writ of certiorari should be granted and this Court should review the decision of the Court of Claims and finally reverse it.

THEODORE B. BENSON,
Attorney for Petitioner.

Of Counsel:

GUIL BARBER,
CHESTER F. WILLIAMS,
WILLIAM MEYERHOFF.